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No. 582

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

UNITED STATES OF AMERICA upon the relation and for the use of the TENNESSEE VALLEY AUTHORITY,
Petitioner,

v.

W. V. N. POWELSON, assignee and successor in interest of Southern States Power Company, a Corporation, et al.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF THE RESPONDENT IN OPPOSITION

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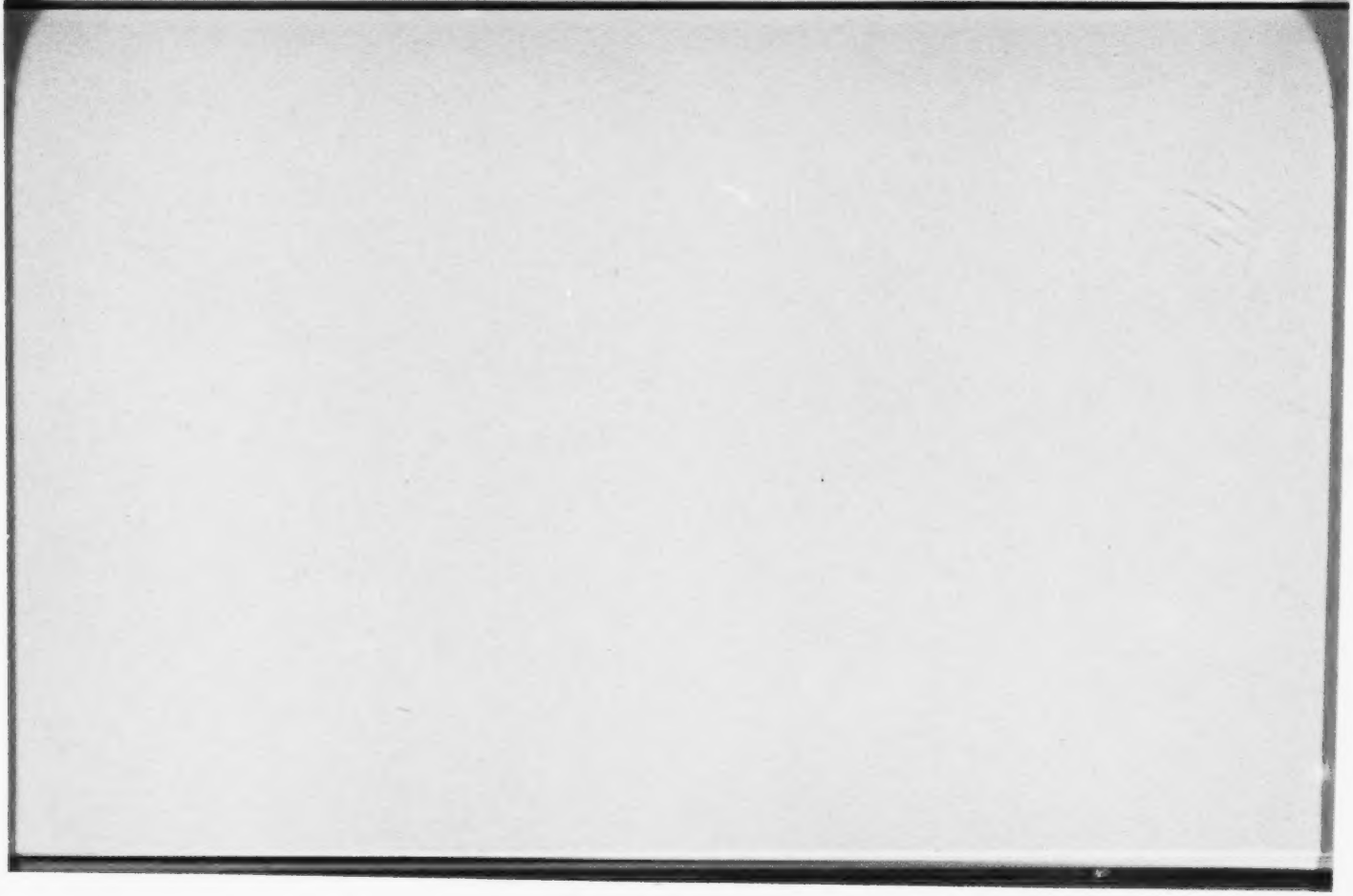

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TABLE OF CASES CITED

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Opinion Below

The opinion of the Circuit Court of Appeals (R. 6-9) is unreported.

Jurisdiction

The petitioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, to review an order of the Circuit Court of Appeals for the Fourth Circuit entered October 8, 1943.

Questions Presented

The questions presented are:

1. Whether it would be proper for this Court to issue a writ of certiorari at the present stage of the proceedings;

2. Whether the order of the Circuit Court of Appeals entered on October 8, 1943, or the opinion of that Court filed therewith, is in conflict with the opinion of this Court entered May 17, 1943, and the mandate of this Court issued July 7, 1943;

3. Whether there is any sufficient reason for the issuance of a writ of certiorari.

Statute Involved

The statute involved, namely Section 25 of the Tennessee Valley Authority Act of 1933, is set forth in the Appendix at pages 22-24.

Statement

The statement of facts contained in petitioner's petition for writ of certiorari is accurate in the main, but respondent submits that such statement is inaccurate at least in its implications in three particulars.

First, in stating or implying that this Court's decision entered on May 17, 1943, necessarily has the effect of depriving respondent of the possibility of receiving an award including any element of water power value.

Second, in stating or implying that the order of the Circuit Court of Appeals issued on October 8, 1943, was a direction to the District Court to include water power value in the award to be made to respondent for the land condemned.

Third, in omitting to call attention to petitioner's amendment to the motion argued before the Circuit Court of Appeals on October 5, 1943, which amendment sought to prevent the District Court from receiving evidence of adaptability for power or reservoir purposes and from giving any consideration to such adaptability.

ARGUMENT

I

A writ of certiorari should not be issued at this stage of the proceedings.

(a) Substantially same relief already sought at same stage of proceedings on same grounds, and denied.

On November 15, 1943, petitioner filed with this Court a motion for leave to file a petition for writ of mandamus, asking in the alternative that a writ of prohibition be issued. The status of the proceedings in this matter has remained unchanged since that motion was presented and, excluding the record of the motion itself and of the action thereon, that motion was based upon the record now before this Court. It was urged in that motion that the Court below was not proceeding in conformity with the opinion of this Court entered on May 17, 1943, and the mandate of this Court issued on July 7, 1943, as the opinion and mandate were construed by petitioner, and the relief sought was to have this Court require the Circuit Court of Appeals to conform to petitioner's ideas as to what would constitute further procedure in conformity with such opinion and mandate.

The petition for a writ of certiorari now presented sets forth, in practically the same language as the previous motion, petitioner's same reasons for thinking that the lower court is not proceeding in conformity with the opinion and mandate of this Court and seeks substantially the same

relief, namely, that the Circuit Court of Appeals be required to do what the petitioner then thought, and now repeats, should be done to constitute procedure in conformity with the opinion and mandate.

With three exceptions every decision cited in the petition for writ of certiorari was cited in the motion, and for exactly the same point. The three exceptions (*United States* v. *Appalachian Power Co.*, 311 U. S. 377; *Oklahoma ex rel. Phillips* v. *Atkinson Co.*, 313 U. S. 508; and *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690) are merely cited in further support of a point for which *United States* v. *Chandler-Dunbar Co.*, 299 U. S. 53, was cited in the motion. And, as we shall see, the point itself was fully presented to this Court prior to its opinion and mandate and should not be included in the present petition.

(b) The motion seeking mandamus was the appropriate procedure.

The motion as made, looking to the issuance of a writ of mandamus or a writ of prohibition, was the proper procedure for determining whether or not the Circuit Court of Appeals was proceeding in conformity with the opinion and mandate of this Court. *Gaines* v. *Rugg*, 148 U. S. 228, 238; *In re Potts*, 166 U. S. 263; *In re Sanford Fork & Tool Co.*, 160 U. S. 247; *Ex Parte Sibbald* v. *United States*, 12 Pet. 488, 492; *Ex Parte Dubuque & Pacific Railroad*, 1 Wall. 69; *Baltimore & Ohio Railroad Co.* v. *United States*, 279 U. S. 781, 785.

The denial of that motion, which constituted the proper procedure for raising all the questions which properly could have been raised either by the motion or present petition for certiorari at this stage, must have disposed of all matters which this Court thought required attention in the present unchanged status of the proceedings. The denial of the motion without prejudice to the petitioner's right to petition for a writ of certiorari *must have been on the assumption that petitioner would not immedi-*

ately make the same request in the same language, with difference only in the label put on the request. The only purpose, obviously, was not to foreclose the petitioner from requesting a writ of certiorari at a later and appropriate stage of the proceedings.

(c) Petition for writ of certiorari at this time would be premature in any event.

Apart from the fact that substantially the same request has already been made to this Court, and denied, a petition for a writ of certiorari at this time is premature. This whole case was fully argued on two different occasions before this Court, and this Court, by its opinion of May 17, 1943, has discussed fully the matters which it considered important up to that time.

The authorities are numerous and unanimous to the effect that whatever was before this Court and disposed of by it by its opinion of May 17, 1943, is *finally settled;* that this Court, as well as lower courts, in further proceedings are bound by the decree or judgment as the law of the case and that on a subsequent hearing in this Court nothing is brought up, nor can be considered by this Court, but proceedings subsequent to the issuing of the mandate following the decision on the first appeal. *Ex Parte Sibbald* v. *United States,* 12 Pet. 488; *Tyler* v. *Magwire,* 17 Wall. 253, 283; *Stewart* v. *Salamon,* 97 U. S. 361; *Sanford Fork & Tool Co., Petitioner,* 160 U. S. 247; *In Re Potts,* 166 U. S. 263; *Gaines* v. *Rugg,* 148 U. S. 228; *Ex Parte Dubuque & Pacific RR.,* 1 Wall. 69; *Browder* v. *McArthur,* 7 Wheat. 58; *Panama Railway Co.* v. *Napier,* 166 U. S. 280; *Roberts* v. *Cooper,* 20 How. 467, 481; *Illinois* v. *Illinois Central Railway Co.,* 184 U. S. 77, 91.

The only proceedings in a lower court in this case since this Court issued its mandate on July 7, 1943, are those in the Circuit Court of Appeals disclosed by the record (pages 2-10) resulting in the entry of the order of October 8, 1943,

and the accompanying opinion. It follows that if this Court again considers this case at this time it would and could do nothing but examine that order and opinion for error.

While the record before this Court shows that the Circuit Court of Appeals proposes to have the District Court initially take the proceedings required in conformity with the opinion of this Court and states that the parties should be allowed to present further evidence if they desire to do so, there is nothing whatever in this record to indicate that the District Court will admit, or that the Circuit Court of Appeals would approve the admission of, any improper testimony, or even that the respondent will offer any testimony whatever. As shown by the record now before this Court, respondent did not make any motion with respect to the procedure to be followed by the courts below in making final disposition of this matter. The action taken by the Circuit Court of Appeals resulted from a motion and supplemental motion by petitioner, and presumably was prompted by a feeling on the part of the Circuit Court of Appeals that upon further consideration additional testimony might be needed for the purpose of more fully or clearly presenting the facts at issue between the parties, particularly in view of the fact that this Court had, in a "case of first impression", concluded that the existence of the power of eminent domain could not be taken into consideration. In any event, this Court should not assume that either of the courts below will act in abuse of discretion by improper admission of additional evidence, even assuming that such evidence is presented.

The order of the Circuit Court of Appeals merely remands the case to the District Court to the end that the new award may be made in the first instance by three District Judges. The accompanying opinion provides that the parties should have leave to present additional evidence to assist the lower court in fixing the amount of the new award if they so desire. The order and opinion deal with pro-

cedural matters. They finally adjudicate no rights or liabilities of the parties. On review of this order this Court could make no decision finally determinative of the rights of the parties. Under such circumstances the frequently announced rule of this Court is to grant a writ of certiorari only in an extraordinary case. *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 258; *American Construction Co.* v. *Jacksonville*, 148 U. S. 372, 384; *Forsyth* v. *Hammond*, 166 U. S. 506, 514.

Obviously, the time to ask this Court for a writ of certiorari will come, if at all, after the courts below have taken further action on this matter determinative of the rights or liabilities of the parties. A petition for a writ of certiorari at this time is premature.

(d) Issuance of writ of certiorari now might do great injustice to respondent.

While this Court held "that profits, attributable to the enterprise which respondent hoped to launch are inadmissible as evidence of the value of the lands which were taken", it was careful to state that "respondent is, of course, entitled to the market value of the property fairly determined. And that value should be found in accordance with the established rules * * * uninfluenced, so far as practicable, by the circumstance that he whose lands are condemned has the power of eminent domain". This Court, however, stated clearly that it held the foregoing "only" (*U. S.* v. *Powelson*, 319 U. S. 266). It follows that the tribunals below must make a somewhat different approach to the question of the fair market value of the land condemned.

The usual procedure in such circumstances, and certainly the equitable one, would be to permit the parties to present anew their contentions as to fair market value based on the evidence already in the record and on such additional testimony as may seem necessary in order to enable the trial tribunal to base its award on a sound foundation of

fact, so far as all such testimony is pertinent and competent in the light of this Court's decision. When this has been done each tribunal below, and this Court on appeal, would have before it the facts required for determination of fair market value under the limitations imposed by this Court's opinion, and each tribunal in turn, would be in a position to determine whether any particular element of value should or should not be included in view of the facts as they appear.

To attempt to determine in advance whether any particular element of value should or should not be included is not only contrary to the general practice and basically illogical, but could easily result in great injustice to respondent.

In spite of the limited nature of this Court's holding and the fact that this Court has assured the respondent and others whose lands are being condemned "that value should be found in accordance with the established rules", the petitioner now seeks to deny respondent the benefit of these established rules by preventing the courts below from exercising their sound discretion as to the admission of additional testimony, and even from applying established rules to the record as it stands. If the petitioner succeeds in this, it will have made the "established rules" empty, meaningless, words for the respondent.

II

There has been no failure to proceed in conformity with the decision and mandate of this Court.

(a) Conformity question arises only with respect to matters submitted to and decided by this Court.

It is established law that the question as to whether or not procedure in the court below is in conformity with the opinion and mandate of this Court applies only with respect to matters submitted to *and disposed of*

by this Court, and that as to all other matters, the court below is free to proceed under the applicable decisions and rules of law without involving any question of conformity with the decision and mandate. *Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247; *In Re Potts*, 166 U. S. 263; *Gaines* v. *Rugg*, 148 U. S. 228; *Ex Parte Sibbald* v. *United States*, 12 Pet. 488; *Ex Parte Union Steamship Co.*, 178 U. S. 317; *Ex Parte French*, 91 U. S. 423.

(b) This Court's decision of May 17, 1943, precluded reliance upon two things, but decided nothing else affecting water power value.

This Court remarked, in its decision, that "The storm center of this controversy is whether water power value may be included in respondent's award", but what this Court actually decided was merely whether certain facts or evidence could be taken into consideration in determining this storm center question. This Court made it perfectly clear that it was approving the general rule that an "owner of lands sought to be condemned is entitled to their market value fairly determined", that "that value may be determined in light of the special or higher use of the land when combined with other parcels", but that "in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future". In this connection the Court referred to the following leading cases on the subject: *U. S.* v. *Miller*, 317 U. S. 369; *Boom Co.* v. *Patterson*, 98 U. S. 403; *McCandless* v. *U. S.*, 298 U. S. 342; *McGovern* v. *New York*, 229 U. S. 363; *Olson* v. *U. S.*, 292 U. S. 246, 255. The Court then pointed out that, in the application of these general principles, use had been made below of evidence as to the profits attributable to the enterprise which respondent hoped to launch and of the fact that respondent had the power of eminent domain. In next to the last paragraph of its opinion, this Court states clearly what it

held, and what it held "only", with respect to water power value, as follows:

> "We hold only that profits, attributable to the enterprise which respondent hoped to launch, are inadmissible as evidence of the value of the lands which were taken. Respondent is, of course, entitled to the market value of the property fairly determined. And that value should be found in accordance with the established rules (United States *v.* Miller, supra)—uninfluenced, so far as practicable, by the circumstance that he whose lands are condemned has the power of eminent domain."

If anything more than the language itself is necessary to show that the Court's holding was limited to probative value and admissibility, of these two things, it can be found in the next succeeding sentence where the Court continues to discuss the admissibility of evidence as follows: "We do not reach the question much discussed at the bar and in the briefs whether evidence of the earnings of respondent's hypothetical four-dam project should have been excluded for the further reason that it was too speculative".

This is what the Court held and this is all that the Court held with respect to water power value, but petitioner tries to read into the decision a final holding that there was no water power value in this case, and to do so refers to the remarks of this Court relating to the amount of value sought to be established for the large or four-dam project and as to the apparent difficulty of proof of water power value in the absence of the power of eminent domain. In this connection, it should be pointed out, as stated in the opinion, that "respondent sought to establish a value of $7,500,000" and that this value was the value for "an elaborate four-dam hydroelectric project". Petitioner puts particular emphasis upon the Court's statement that without the power of eminent domain the chances of making the combination "appear to be too remote and slim" to have any legitimate

effect upon value and that "respondent therefore has not established the *basis* for proof of the water power value *which was asserted*". This language is immediately followed by the language quoted above, beginning with "We hold *only*". (Italics supplied.)

It should also be pointed out that the passing statements made by the Court as to the water power value for less than the four-dam hydroelectric project were based upon statements which were made by the petitioner in its brief, but which are not supported by the record. If the record is not already clear on the matter, respondent may offer to the court below proof that there was water power value for a project or projects other than the four-dam hydroelectric project, that respondent had all or most of the land for such other project or projects and also that respondent could, without the power of eminent domain, have acquired the necessary additional properties, if any. The alleged admissions as to the necessity of using the power of eminent domain attempted to be supported by quotations from the testimony, which quotations are lifted from their context, are completely misleading. If the record is not already clear on the subject, respondent may present evidence to show that while the power of eminent domain might be necessary to complete any or all projects without paying substantially more for a few parcels of land than respondent would have paid by using the power of eminent domain, nevertheless, respondent could have acquired all necessary lands without having to pay such large prices as to impair substantially the feasibility of the project.

It should be remembered that the record shows that the holdings of respondent in continuous ownership of the bed and banks of Hiwassee River from a point slightly above the North Carolina-Tennessee State Line upstream for a distance of 24 miles, and entirely within the State of North Carolina, were such that 255 ft. of the fall of the river could be developed by two dams located entirely on respondent's

property, creating reservoirs entirely on respondent's lands.*

The record shows that the addition of only 1229 acres owned by strangers to the area owned by respondent in the Powelson reservoir basin would effect a combination constituting all of the land necessary for the Powelson development as adopted by respondent, having a hydraulic head of 245 ft. and a reservoir capacity of 17,250,000,000 cu. ft., or about 400,000 acre ft. [Res. Com. Ex. R-17, offered Com. Tr. 156. See judgment of United States District Court, p. 1057 of Printed Record in this Court for hearing on the merits].

Thus, the addition of only 1229 acres to an area of some 22,000 acres owned by respondent would effect a combination

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*The map of level contour lines in the Powelson reservoir basin (Res. Com. Ex. R-257 offered Com. Tr. 1273) shows that a dam at the Powelson site to raise the water there 150 ft. high, namely, to elevation 1425 ft. above sea level, would back the water up Hiwassee River a distance of 14 miles. Res. Com. Ex. R-8 (offered Com. Tr. 125) shows that respondent owned throughout said 14 miles all of the bed and banks of Hiwassee River and all of the land in that basin below the 1425 ft. contour line.

Exhibit R-8 shows that respondent also owned all of the bed and banks of Hiwassee River extending from the Powelson damsite downstream to a damsite, in the State of North Carolina, a fraction of a mile above the North Carolina-Tennessee State Line and all of the land that would be overflowed by a dam at that site to raise the water 105 ft. thereby backing it up the river a distance of 10 miles to the Powelson damsite, and creating a reservoir containing about 2,750,000,000 cu. ft. (Res. Com. Ex. R-17, offered Com. Tr. 156).

From the cross examination of Mr. Powelson:

"Q. * * * Do you remember that back in 1924 and 1925 you employed J. G. White & Company for certain engineering surveys?

* * * *

"A. * * * They estimated on a dam near the State Line.

"Q. That would be the Appalachia site?

"A. Well, there is a site about a mile above Appalachia. We wanted to get a comparison as to that site with the Appalachia. They are just about a mile apart." [Com. Tr. 1752-1753; pp. 292-293 of the printed record for this Court for the hearing on the merits.]

of lands, all in the State of North Carolina, capable of containing both the Powelson and an Appalachia development extending along Hiwassee River in North Carolina throughout a length of 31 miles in which there is a fall of 350 ft., thereby creating an hydraulic head of 350 ft. and a storage capacity of 20,000,000,000 cu. ft., or about 460,000 acre ft., all in one ownership. It would not have been intelligent to burden the former trial by fully developing those possibilities at that time. These two projects would represent but a portion of the four-dam project which respondent hoped to launch.

The Circuit Court of Appeals should not be condemned if it has permitted respondent to introduce additional evidence more clearly to show the water power value of its lands whether as (1) a combination constituting, without the aid of lands owned by strangers, all of the lands necessary to develop for power a fall of 255 ft. in Hiwassee River; or (2) as a part of a combination in which only 1229 acres owned by strangers would be necessary to develop for power a fall of 350 ft. in Hiwassee River, provided it could be shown that there was a reasonable probability that such combination could have been made, without regard to the power of eminent domain.

It is not necessary to speculate as to what this Court thought about the case respondent had made, or could make, without the two kinds of evidence to be excluded, when the Court's opinion made it perfectly clear that "We hold *only*" (Italics supplied) that certain profits are inadmissible as evidence and that "value should be found in accordance with the established rules * * * uninfluenced, so far as practicable, by the circumstance that he whose lands are condemned has the power of eminent domain".

Remembering that this Court not only did not rule out water power value but, on the contrary, expressly stated that value should be found in accordance with the established rules subject only to the limitation imposed by the Court's decision, let us now see what has been done by the Circuit Court of Appeals since this Court's mandate was

issued and whether or not the Circuit Court of Appeals has failed to proceed in conformity with the opinion and mandate of this Court.

(c) Action by Circuit Court of Appeals subsequent to Supreme Court mandate.

It is clear, from the petition for writ of certiorari now under consideration and from the initial and supplemental motions made by petitioner in the Circuit Court of Appeals (R. 3, 4 and 5), that the petitioner's real complaints are, first, against the failure to exclude "from consideration any value alleged to result from the adaptability of the property for power or reservoir purposes", and, second, against the Court's statement that the parties should be allowed, if they desire, to adduce additional evidence as to the value of the property taken, in the light of the Supreme Court's decision.

The fact that the Circuit Court of Appeals has directed that further action in this matter be taken initially by the District Court, rather than by the Circuit Court of Appeals, does not seem to be seriously opposed by petitioner, and it is not believed that such action could be opposed, as it is in the discretionary power of the Circuit Court of Appeals and is clearly the best way to get the necessary further proceedings going.

The Circuit Court of Appeals at the beginning of its opinion accompanying its order of October 8, 1943, says:

> "We have given careful consideration to what should be the future procedure in the case, and are of the opinion that it should be remanded to the District Court for further proceedings *in accordance with the principles laid down by the Supreme Court*" (R. 6). (Emphasis supplied.)

The Circuit Court of Appeals next examines the opinion of this Court to determine just what error the Supreme

Court had found in the record as presented to it and what directions this Court had given in its opinion to guide the lower court in further proceedings (R. 7). It cites and quotes from some of the cases cited by this Court as establishing the principles controlling the fair determination of market value (R. 7-8). It is careful to explain why it feels that in the interest of right and justice the case should be remanded to the District Court for further proceedings. It indicates what it feels to be the deficiency in the record making it difficult for a court fairly to determine the market value of respondent's lands on the basis of the record as it stands (R. 8). It expresses the opinion that if the parties desire to adduce additional evidence in the light of the Supreme Court's decision, they should be allowed to do so (R. 9).

In referring to the matter of a value determined in the light of a special or higher use of respondent's land when combined with other parcels, it not only gives effect to the limitation declared by the *Olson* case and quoted by this Court in its opinion, but combines with that an additional limitation established by the opinion of this Court. One is entitled, says the Circuit Court of Appeals, "to have his holdings valued on some other basis than that of numerous small separated tracts of wild mountain land, *if it be found, irrespective of the possession of the power of eminent domain by the landowner, that 'there is a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future'* ". (R. 9; emphasis supplied)

In its order and opinion the Circuit Court of Appeals makes no attempt to adjudicate any rights or liabilities of the parties. It merely seeks to provide for a redetermination of the market value of respondent's land in the manner it considers most likely to result in a fair determination thereof. It is submitted that not only is there nothing in the order and opinion of the Circuit Court of Appeals in conflict with the opinion and mandate of this Court, but

that, on the contrary, the lower court was careful in sending the case to the District Court to call to the attention of that court the opinion of this Court and the cases cited by this Court as establishing the basis upon which a fair determination of market value of respondent's land is to be made.

(d) There is no lack of conformity.

As heretofore pointed out (ante p. 9), any matter left open by the mandate of this Court may be considered and determined by the lower court.

It is perfectly clear that neither the Circuit Court of Appeals nor the District Court will give any consideration to "profits attributable to the enterprise which respondent hoped to launch" and that the value will be "found in accordance with the established rules (*U. S.* v. *Miller, supra*)—uninfluenced, so far as practicable, by the circumstance that he whose lands are condemned has the power of eminent domain". Subject to these limitations, this Court has definitely given the courts below the task of finding values; and the action taken by the Circuit Court of Appeals proposes performance of that task in strict compliance with the opinion of this Court and other applicable decisions and rules of law.

The question as to whether or not the parties should be allowed to introduce additional evidence on any of the matters left open by this Court is clearly a matter of judicial discretion.

This Court's opinion and mandate make it the duty of the court or courts below to fix an award for the lands taken and leave open the question as to whether or not there is any water power value, provided only that, as decided by this Court, consideration shall not be improperly given to evidence of profits of the enterprise or to the existence of the power of eminent domain. The record presented as a basis for the present petition for a writ of certiorari not only does not show any conflict with this Court's opinion or mandate, but, on the contrary, shows that the steps taken,

and contemplated, below are for the purpose of solving only the problems left open by this Court and thus performing the task assigned by this Court. The procedure outlined by the Circuit Court of Appeals, including the provision for adducing additional testimony, is clearly within the sound discretion of the court below.

III

There has been no abuse of discretion by the Circuit Court of Appeals.

Without waiting to see what, if any, additional testimony will be offered by respondent, petitioner concludes that respondent should not be allowed the opportunity to offer any additional evidence, apparently on the theory that respondent should have offered full evidence on alternative bases for fear that the basis on which respondent was proceeding might be found improper. It seems to be petitioner's idea that, if respondent has failed to do this, respondent should now be required to take the record as he finds it and that it would be error for the court below to give any further opportunity to offer testimony.

If there ever was a situation which justified the Court's use of its discretion in allowing additional evidence this would seem to be that case.

Evidence as to profits of the enterprise was accepted, and consideration of the existence of the power of eminent domain was taken into consideration by three Judges in the District Court, then by three Judges in the Circuit Court of Appeals, and finally the case on this record was argued before the Supreme Court of the United States. No dissent from consideration of these two matters was voiced by any one of the six Federal Judges below, or by four of the Justices of this Court.

To conclude now that respondent should have foreseen the decision of this Court on those two matters, under all

of the circumstances, and spent the time and money required to present complete testimony on another theory or theories, and, if he did not do so, should not now be allowed to supplement his evidence on value, would be, to say the least, extraordinary, and less than full justice to the respondent.

Certainly this Court cannot say, as a matter of law, that the court below has so flagrantly abused its discretion by making provision for such additional testimony as to call for the issuance of a writ of certiorari at this time and without waiting to see what may actually be done as a result of the order of the Circuit Court of Appeals. That the discretion of the court below may be exercised as was done here with respect to matters not decided by this Court is well established.

The situation here, in some of its aspects, is analogous to that existing in the case of *U. S.* v. *Appalachian Electric Power Company* in which this Court on October 19, 1942, denied a petition of the United States for the construction by this Court of its mandate to the lower court. This Court declined to interfere in the proceedings in the District Court had for the purpose of carrying into effect the mandate received from this Court although the District Court proposed to allow the taking of additional testimony on a point as to which it deemed such testimony desirable. *U. S.* v. *Appalachian Electric Power Co.*, 317 U. S. 594.

IV

No basis for issuance of writ of certiorari now.

As stated above, all the arguments made by petitioner in support of its petition reduce themselves, upon analysis, to the one proposition, that the Circuit Court of Appeals is not proceeding, under the applicable decisions and principles of law, in conformity with the opinion and mandate of this Court; but, the petitioner, apparently in an effort to create a basis for the issuance of a writ of certiorari and

escape the fact that substantially the same remedy has heretofore been sought on substantially the same grounds, and denied, now asserts the same conflict with the same decisions but sets the assertion up in four numbered divisions, as was not done in the motion seeking writ of mandamus or writ of prohibition. It may, therefore, be desirable to examine briefly the separate allegations of conflict with other decisions.

Number 1 asserts conflict with this Court's opinion and mandate in this case. This question, as already shown, was necessarily involved in the motion seeking writ of mandamus or writ of prohibition, and disposed of when that motion was disposed. As already shown there is no such conflict.

Number 2 asserts conflict with principles announced by this Court in *In re Potts*, 166 U. S. 263; *Gaines* v. *Rugg*, 148 U. S. 228, 238; *Ex parte Dubuque & Pacific R. R.*, 1 Wall. 69; *Sibbald* v. *United States*, 12 Pet. 488; and *Tyler* v. *Magwire*, 17 Wall. 253.

The decision below is not in conflict with these cases. They merely hold as to matters decided by this Court that, without leave of this Court, the court below is bound and may not again go into such matters. These cases actually support our contention that the court below is not only free to go into matters not decided by this Court but ordinarily must go into them in order to do its duty, and that the court below may in such cases proceed as the Circuit Court of Appeals has proceeded in this case.

Under number 3 it is asserted that the decision below is in conflict with *Merchants' Banking Co.* v. *Cargo of the Afton*, 134 Fed. 727 (C. C. A. 2d), certiorari denied, 196 U. S. 639; *In re Mifflin Chemical Corp.*, 123 F. (2d) 311 (C. C. A. 3d) certiorari denied, *sub nom. Sheridan* v. *Rothensies*, 315 U. S. 815, and *Bassick Mfg. Co.* v. *Adams Grease Gun Corp.*, 54 F. (2d) 285 (C. C. A. 2d), certiorari granted, 285 U. S. 531, certiorari dismissed, 286 U. S. 567. In each of those cases the issue in the case had been decided and an attempt was made by one of the litigants to have the case

reopened and the issue retried. That is not the situation here. The cases are not in point.

As to number 4, the petitioner cites *United States* v. *Chandler-Dunbar Co.*, supra; *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377; *Oklahoma ex rel. Phillips* v. *Atkinson Co.*, 313 U. S. 508; and *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, and attempts to make out conflict. These cases do not relate to any question that can properly be raised in the present petition. A citation of them merely constitutes an effort to present again the same points that were presented to this Court in briefs and argument before this Court's decision on the merits. It is an effort to get this Court to allow a rehearing on matters presented to it prior to its decision and mandate —to present something which is not now properly presentable by a writ of certiorari.

Petitioner recognizes in its petition (Pages 9 and 10) that although the above question was presented to this Court on the occasion of its first consideration of this case, this Court in its decision did not pass on that question, but found error on other grounds and returned the case to the Circuit Court of Appeals for further proceedings in conformity with its opinion.

What petitioner is now seeking, in effect, is to have this Court at this time rehear the case and amend its former opinion by passing on a question on which it reserved its opinion on the occasion of the first appeal. The authorities are all to the effect that this Court will not do this if indeed it has power to do so. *Ex parte Sibbald* vs. *U. S.*, 12 Pet. 488; *Tyler* vs. *Magwire*, 17 Wall. 253, 283; *Stewart* v. *Salamon*, 97 U. S. 361; *Browder* v. *McArthur*, 7 Wheat. 58; *Roberts* v. *Cooper*, 20 How. 467, 481; *Illinois* v. *Illinois Central Railway Co.*, 184 U. S. 77, 91.

It should be noted that the order of the Circuit Court of Appeals of October 8, 1943, affords no basis for reconsidering the question of the application of the principles of the *Chandler-Dunbar Case* to this case. That order

adjudicates no rights of the parties. It does not adjudge whether or not the respondent is entitled to have an award including an allowance for water power value. The order merely permits the introduction of testimony in order that the Court may determine from the record and in the light of the decision of this Court whether or not such water power value should be included in the award and, if so, to what extent. Until that determination is made there can be nothing in the record since the mandate of this Court was issued on which this Court can base a further consideration of the question of whether water power value should be excluded from respondent's award upon the principles of the *Chandler-Dunbar Case*.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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